114

Supreme Court, U.S.
FILED
DEC 11 2008
OFFICE OF THE CLERK

No. 08-294

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities; THOMAS C. HORNE, Super. of Public Instruction,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85012
(602) 200-0104

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

December 11, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. The Decision Below Conflicts With Decisions From Other Courts Of Appeals 3

II. The Decision Below Conflicts With Congress's Policy Judgments 7

III. The Decision Below Raises Issues Of National Importance 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Castaneda v. Pickard,
648 F.2d 989 (1981) 8, 9

Evans v. City of Chicago,
10 F.3d 474 (7th Cir. 1993) 4, 5

Frew v. Hawkins,
540 U.S. 431 (2004) 4, 11

In re Detroit Auto Dealers Ass'n,
84 F.3d 787 (6th Cir. 1996) 3

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 12

League of United Latin Am. Citizens v. Clements,
999 F.2d 831 (5th Cir. 1993) 4

Miller v. French,
530 U.S. 327 (2000) 3

O'Sullivan v. City of Chicago,
36 F.3d 843 (7th Cir. 2005) 4

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 11

Reynolds v. McInnes,
338 F.3d 1221 (11th Cir. 2003) 6

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) 3

United States v. City of Miami,
2 F.3d 1497 (11th Cir. 1993) 4

United States v. Fausto,
484 U.S. 439 (1988) 8, 9

Verizon Commn'cs Inc. v. Trinko,
540 U.S. 398 (2004) 8

Statutes and Rules

20 U.S.C. § 1703(f) 8

20 U.S.C. § 6302 9

20 U.S.C. § 6311(a) 7

20 U.S.C. § 6311(g) 7

20 U.S.C. § 6812(2) 8

20 U.S.C. § 6825(g) 9

20 U.S.C. § 6845 9

20 U.S.C. § 6847 9

20 U.S.C. § 7902 9

20 U.S.C. § 801 9

REPLY BRIEF FOR PETITIONERS

The opposition briefs do not respond meaningfully to the fundamental points raised in the petition. Respondents instead sow confusion, focusing largely on irrelevant issues swathed in a mantle of shrill rhetoric. Rather than addressing whether the Ninth Circuit applied the proper standards for modifying an injunction, they concentrate on whether Arizona's latest effort (H.B. 2064) to satisfy the district court's funding mandates is appropriate. Respondents thus concede, and repeatedly emphasize, that this case is all about money—the "*only* unresolved dispute" is not whether Arizona's schools are meeting performance standards (they are), but whether Arizona must obey the lower courts' command to increase funding earmarked for English-language-learner ("ELL") programs. Flores Br. 28 (emphasis added).

Respondents contend that review is not warranted because the courts below have been a "model of judicial restraint." Flores Br. 29-30. But it is impossible to reconcile that blithe assertion with this case's epic history. What began as a seemingly modest class action limited to seeking reform of a single then-underperforming school district has morphed into a state-wide injunction requiring that the Arizona Legislature dramatically increase funding earmarked for ELL programs or face the prospect of multi-million-dollar fines. The upshot is that the federal judiciary has become enmeshed in a highly politicized debate over how best to run Arizona's schools. Even more

regrettably, in taking sides in that debate, the lower courts have prevented the State's duly elected officials from serving the interests of Arizona's students by creating proper incentives for local officials to employ efficiently the considerable taxpayer monies already provided to Arizona's schools.

Given this, and for reasons explained in the petition, certiorari is warranted to resolve the clear split between the Ninth Circuit's decision and the decisions of other courts of appeals, and to clarify this Court's authorities concerning the proper role of federal courts involved in institutional reform litigation. *See* Pet. 21-29. This Court's review is also needed to provide guidance on the relationship between the federal policy judgments embodied in the No Child Left Behind Act and the Equal Educational Opportunity Act's mandate that States take "appropriate action" to provide non-English speaking students with equal educational opportunities. *See* Pet. 29-34. Finally, certiorari is warranted because what is required to comply with the EEOA's "appropriate action" requirement is an issue of exceptional national importance. *See* Pet. 34-38. The lower court's intrusion into the prerogatives of Arizona's elected officials poses a threat to any State or Territory within the Ninth Circuit seeking to improve educational opportunities by providing incentives for schools to maintain quality programs while reducing costs and avoiding unnecessary waste. That threat can and should be defused by this Court's review of the decision below.

I. The Decision Below Conflicts With Decisions From Other Courts Of Appeals.

Respondents downplay the chasm between the Ninth Circuit's decision and decisions of other courts of appeals concerning the proper standards for modifying an injunction in the context of institutional reform litigation. Respondents instead argue that the court below invoked a proper abuse-of-discretion standard, undertook an "exhaustive examination of the factual record," and quoted parts of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). But these non-issues have no bearing on the basic doctrinal departures infecting the Ninth Circuit's decision.

Respondents do not address the clear conflict between the Ninth Circuit's approach and that of the Sixth Circuit, a split the Ninth Circuit itself acknowledged. *See* Pet. App. 51 n.31. In the Sixth Circuit, a "proper respect for previously entered judgments" does *not* require that "old injunctions remain in effect" when legal requirements change. *In re Detroit Auto Dealers*, 84 F.3d 787, 790 (6th Cir. 1996). In stark contrast, the court below held that "settled judgments" should not be re-litigated and, therefore, an old injunction must be assessed "applying the legal framework used by the original unappealed judgment." Pet. App. 51 n.31; *cf. Miller v. French*, 530 U.S. 327, 344-45 (2000) (modifying a continuing injunction does not impermissibly reopen a final judgment).

Nor do Respondents meaningfully address the decisions from the Fifth, Seventh, and Eleventh Circuits holding that defendants' "consent" to an injunction—either because they failed to appeal or

because they do not seek modification—is irrelevant in the context of institutional reform litigation. *See League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993); *Evans v. City of Chicago*, 10 F.3d 474, 477-80 (7th Cir. 1993); *United States v. City of Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993). Respondents contend that the Ninth Circuit's decision had "nothing to do with" the named defendants' "failure to appeal." Flores Br. 20. But that assertion is belied by the Ninth Circuit's repeated statements that it would not "grant[] relief from judgment on grounds that could have been raised on appeal." Pet. App. 60a; *id.* at 51a (request for modification "may not be used to remedy a failure to contest in the first instance the legal rulings underlying the judgment"); *id.* at 68a (refusing to "reopen matters made final when the [original] [j]udgment was not appealed").

Other courts of appeals have held that respect for separation of powers, local democratic governance, and the broader public interest require modifying a decree whenever there is reason to do so. *See O'Sullivan v. City of Chicago*, 36 F.3d 843, 862-63 (7th Cir. 2005); *accord Frew v. Hawkins*, 540 U.S. 431, 442 (2004). Accordingly, when faced with a modification request, doubts are "resolved in favor of leeway for the political branches." *Evans*, 10 F.3d at 479. The decision below reaches an opposite conclusion. According to the Ninth Circuit, "federalism concerns are substantially lessened" when the named defendants "wish the injunction to remain in place." Pet. App. 52a.

The Ninth Circuit's misguided approach creates an intolerable lack of uniformity in the lower courts' approach to institutional reform litigation. If this case were litigated in the Sixth, Seventh, or Eleventh Circuits, the court would have considered whether the original injunction could be issued on the facts and law as they now exist. That inquiry would have required addressing the unrefuted evidence that Arizona has cured the performance deficiencies in Nogales schools on which the district court based its original order; that Arizona is implementing NCLB's detailed requirements for educating ELL students; and that every expert, including Respondents' own witness, testified that by 2006 Nogales schools were conducting effective ELL programs.

In contrast, the Ninth Circuit focused narrowly on whether Arizona complied with the decree's technical terms requiring substantial increases in funding earmarked for ELL programs, without considering Nogales School District's specific funding needs or the total state monies available for ELL instruction. *See* Pet. App. 69a (if petitioners "believed that the district court erred and should have looked at all funding sources differently ..., they should have appealed"). That singular focus on the decree's original "premises"—that EEOA compliance requires increased ELL-specific funding—runs counter to the Seventh Circuit's holding that an injunction should be enforced only if there is a substantial, continuing violation of federal law, not simply a continuing violation of the decree itself. *Evans*, 10 F.3d at 477-80.

It also contravenes the Eleventh Circuit's recognition that a decree should be modified when its "basic purposes" are accomplished, even if the decree's contemplated means for achieving those purposes are not implemented. *See Reynolds v. McInnes*, 338 F.3d 1221, 1226 (11th Cir. 2003). Respondents try to argue that the Ninth Circuit considered the injunction's "basic purposes," but even they concede that the performance deficiencies underlying the lower court's original judgment are resolved, for the "*only* unresolved dispute" is Arizona's alleged "failure to provide school districts with adequate funding." Flores Br. 28 (emphasis added). Because more funding is not an end in itself, but only a means for achieving EEOA objectives, that concession confirms that the Ninth Circuit has improperly substituted its policy preferences for those of Arizona's elected officials.

In the end, instead of faithfully applying the "flexible" standard required under this Court's authorities, the Ninth Circuit held that a judicial decree may be modified only in "rare" instances where the prior judgment is "so undermined" by later circumstances that "its continued enforcement" is "inequitable." Pet. App. 60a. That daunting standard echoes the "grievous wrong" standard rejected by this Court. *See* WLF Amicus Br. 9-15. The Court should grant review to correct the Ninth Circuit's improper departure from precedent and close the large gap between the decision below and decisions from other courts of appeals.

II. The Decision Below Conflicts With Congress's Policy Judgments.

Respondents argue that although Congress enacted comprehensive education reform in 2002, including an entire title of NCLB (Title III) focused on ELL instruction, the congressional policies embodied in NCLB are irrelevant. In Respondents' view, Arizona's compliance with NCLB's painstaking requirements can play no part in determining whether Arizona is taking "appropriate action" to help students "overcome language barriers." But, here again, Respondents' arguments only confirm that this Court's intervention is needed, both to ensure that congressional policies are vindicated and to clarify the interplay between NCLB and the EEOA.

Respondents contend that NCLB is not a benchmark for "appropriate action" under the EEOA because the two statutes impose "different requirements" and NCLB applies only if a State elects to receive federal funding. But Arizona indisputably receives federal funding under NCLB, subjecting its ELL programs to close oversight by the Department of Education. *See* 20 U.S.C. § 6311 (a), (g). Whatever the EEOA may demand when a State "opts out" of NCLB, when a State adheres to NLCB's comprehensive requirements for ELL education the State does not commit a civil rights violation merely because it chooses not to allocate more funds for programs that (already) meet federal performance standards. Although a district court may have authority under the EEOA to remedy individual instances of alleged discrimination, it has no authority to mandate

sweeping, state-wide funding increases that conflict with NCLB's basic policies of shifting focus away from funding and toward accountability and results.

Echoing the Ninth Circuit, Respondents next contend that NCLB and the EEOA "serve different purposes." Flores Br. 26. In fact, the two statutes focus on the same objective: ensuring educational opportunities for students not proficient in English. *Compare* 20 U.S.C. § 1703(f) *with* 20 U.S.C. § 6812(2). Significantly, NCLB's Title III incorporated the Bilingual Education Act, which Congress enacted alongside the EEOA in the 1974 amendments to the Elementary and Secondary Education Act. *See Castaneda v. Pickard*, 648 F.2d 989, 1009 (1981). Courts have thus recognized that other legislation reflecting Congress's educational policies, like the Bilingual Education Act, are relevant in determining what constitutes "appropriate action" under the EEOA. *See id.*; *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("implications of a statute may be altered by the implications of a later statute"); *Verizon Comm'cs Inc. v. Trinko*, 540 U.S. 398, 412-16 (2004) (extensive regulatory framework under the Telecommunications Act informs proper enforcement of antitrust laws).

Respondents maintain that a wedge divides NCLB and the EEOA, because NCLB does not include a private right of action, does not "require" States to "establish ... any particular type of instruction program," and is not supposed to "be construed in a manner inconsistent with any Federal law guaranteeing a civil right." State Br.

16; Flores Br. 27 (20 U.S.C. §§ 6845, 6847). But nothing in these provisions prevents the Court from interpreting the two statutes to make "sense in combination." *Fausto*, 484 U.S. at 453. Indeed, that Congress declined to dictate any "particular type of instruction program" is consistent with the EEOA, which leaves "state and local educational authorities a substantial amount of latitude in choosing the programs and techniques" used to meet their "obligations." *Castaneda*, 648 F.2d at 1009.

Respondents also argue that NCLB should not serve as a benchmark for measuring EEOA compliance because NCLB prohibits States from "supplanting" state funds with federal funds. *See* Flores Br. 24 (20 U.S.C. § 6825(g)); State Br. 17 (20 U.S.C. § 7902)). In fact, NCLB merely prohibits States from employing federal funds to cover "core" educational obligations that would otherwise be funded with state monies; it does not require that States pay *all* costs of ELL instruction. *See* Flores Br. 25 (quoting 2008/10/02 DOE Guidance); 20 U.S.C. § 6321(d). Respondents' interpretation renders NLCB's Title III, as well as several provisions of Title I, meaningless inasmuch as the statute specifically contemplates using federal funds for ELL instruction *See* 20 U.S.C. §§ 801, 6302.

The suggestion that Arizona is "supplanting" federal funds is just a restatement of Respondents' (and the Ninth Circuit's) policy disagreement with Arizona's elected representatives. Arizona has pursued policies to ensure that school districts have proper incentives to run efficient, cost-effective

programs. To these ends, Arizona makes base-level funding available to all school districts, while also providing ample other sources of state funding that may be used to cover additional costs incurred by individual school districts.

III. The Decision Below Raises Issues Of National Importance.

Respondents do not dispute that whether NCLB informs the EEOA's "appropriate action" requirement is a matter of national importance. They do not dispute that States need guidance on what is required to comply with the EEOA, or that resolving the questions presented will have far-reaching consequences. Nor do they offer any response to the extensive evidence showing that, contrary to the assumptions indulged by the courts below, increased funding is not necessarily the best path toward improving educational opportunities.

Respondents nonetheless contend that this case is a "poor vehicle" for the Court's review because H.B. 2064 presents "unique" issues. But H.B. 2064 is not the focus of the petition, much less dispositive as to whether the injunction should be modified. H.B. 2064 is merely further evidence that Arizona is making funds available for ELL instruction. With or without H.B. 2064, Nogales School District has fixed the performance deficiencies underlying the district court's original judgment, Arizona's schools are implementing NCLB's performance requirements, and ample state funds are available for effective ELL programs.

Respondents nonetheless contend the injunction cannot be modified because H.B. 2064's funding provisions violate federal law. *See* State Br. 20. But that again focuses on the wrong issue: the question is not whether Arizona's attempts to satisfy the lower court's funding mandates are appropriate, but whether Arizona has taken "appropriate action" under the EEOA. Because Arizona has cured the performance deficiencies on which the district court based its original judgment, the State has established "reason[s] to modify" the injunction and the courts below should have made "the necessary changes." *Frew*, 540 U.S. at 442.

Respondents contend that H.B. 2064 violates NCLB because the lower courts found that the legislation improperly considers federal funds and violates federal supplanting restrictions. *See* State Br. 20-21. These conclusions are flawed and hotly disputed. But, more importantly, the courts below should not have reached out to decide the issue. *Frew*, 540 U.S. at 441 (injunctions should be limited to "reasonable and necessary implementations of federal law"). As Respondents concede, NCLB includes no private right of action; instead, NCLB compliance falls within the Department of Education's jurisdiction. *See* Flores Br. 26 (citing cases); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (when Congress enacts legislation under its spending power, "the typical remedy" is "not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds").

The Ninth Circuit's approach thus turns the statutory scheme on its head. Although the courts below refused to consider NCLB in interpreting the EEOA, they employed the eight-year-old injunction to expand their jurisdiction and effectively permitted plaintiffs to pursue a private right of action that Congress never intended. *See Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994) (courts may not expand their jurisdiction by judicial decree). The Ninth Circuit's determination that the injunction must remain in place because, in its view, the Arizona Legislature's attempts to satisfy the lower court's funding mandates run afoul of a statute subject to the Department of Education's jurisdiction underscores just how far this case has mutated away from the limited (and now resolved) single-school-district performance deficiencies that formed the original basis for the injunction.

Respondents also complain that H.B. 2064's incentive for schools to teach students English within two years is unreasonable. *See* State Br. 20. But H.B. 2064 does not eliminate all funding after two years; if students are not taught basic English language skills within two years, funding for structured English immersion ends and a school district must look to supplement its base funding from other sources. (ELL funding used for small group instruction, extended day classes, summer school, and intersession classes, remains available to help struggling students). The two-year requirement serves Arizona's EEOA obligations by holding schools accountable and combating perverse incentives for keeping students

languishing in special-education programs. If two years proves too short and performance declines, NCLB contains steep penalties and, if appropriate, individual students who claim to have been denied appropriate ELL instruction may seek targeted relief under the EEOA. But federal courts have no authority to impose their own preferred programmatic reforms on Arizona's educational system via sweeping, state-wide injunctions.

Finally, Respondents argue that the lower court's injunction does not intrude on local prerogatives because it "merely" requires Arizona to implement dramatic increases in earmarked funding to cover all costs of ELL instruction. Flores Br. 29-30. That assertion underscores how little deference has been afforded to Arizona's right to control its own educational policies. Where the courts below see increased funding as the only way to manage Arizona's schools, Arizona's elected officials recognize that school districts must have proper incentives to reduce costs, increase efficiency, and improve overall student performance. Let there be no mistake: the beneficiaries of the district court's injunction are not Arizona's schoolchildren, but entrenched interests seeking to implement funding policies rejected by educational experts and Arizona's democratically elected officials. This Court's intervention is needed to arrest this improper judicial policymaking and end the lower courts' intrusion into Arizona's local institutions.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85102
(602) 200-0104

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Counsel for Petitioners

December 11, 2008